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Nos. 128–129

In the Supreme Court of the United States

OCTOBER TERM, 1941

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT CO. FIRST MORTGAGE BONDS, A CORPORATION, AND MARLBOROUGH HOUSE, INC., A CORPORATION, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 23–43) is reported at 40 B. T. A. 882. The opinions in the Circuit Court of Appeals for the Ninth Circuit (R. 262–281), are reported in 118 F. (2d) 511.

JURISDICTION

The judgments of the Circuit Court of Appeals for the Ninth Circuit were entered March 8, 1941. (R. 282–283.) The petition for writs of certiorari was filed on June 5, 1941, and was granted October 13, 1941. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pursuant to plan, a bondholders' committee bought in the mortgaged assets by paying cash to the record owners and foreclosing. The committee thereafter transferred the properties to a new corporation in return for a distribution to depositing bondholders of all of the new corporation's common stock.

The question is whether the committee and the new corporation, in computing depreciation, are entitled to use the same basis the properties had in the hands of the original corporate mortgagor. The answer depends, first, upon whether the assets were acquired in a "reorganization" under Section 112 (i) (1) of the Revenue Act of 1932, and secondly, upon whether in any event Section 113 (a) (7) would provide the basis claimed in the circumstances of this case.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 17–21.

STATEMENT

The material facts found by the Board of Tax Appeals may be summarized as follows:

On May 20, 1927, the Marlborough Investment Co., a corporation, issued its bonds in the aggregate principal sum of $500,000. These bonds were secured by a mortgage or deed of trust upon the corporation's apartment building in Seattle, Washington, known as the Marlborough House, and upon the personal property within it. (R. 26.)

There was a default in payment of the bonds on May 10, 1932. Shortly thereafter a bondholders' committee was organized. A written deposit agreement was executed,[1] and the holders of $441,100 of face value bonds, or more than 97% of the total of $453,900 then outstanding, deposited their bonds under the agreement. (R. 26, 31.)

On August 26, 1932, the National Bank of Commerce of Seattle, trustee under the mortgage, commenced foreclosure proceedings pursuant to the written request of the bondholders' committee. While these proceedings were pending, the trustee and certain of the defendants to the foreclosure action entered into a stipulation, dated July 1, 1933, under which the parties consented to the entry of a foreclosure decree and the record owners of the property (State Developers, Inc., and

[1] The agreement, together with a copy of the certificate of deposit, is set out in full at R. 86–109.

Russell L. Cooley and Lillian A. Cooley) executed and delivered a quit claim deed to the properties in consideration of a payment of $10,025 in cash.[2] (R. 31.)

Under the stipulation, the parties further agreed to turn over possession of the real estate and personalty to the trustee or its nominees. (R. 32.) On the same date, July 1, 1933, the judgment and decree of foreclosure were entered in accordance with the stipulation. (R. 33.) The committee provided the $10,025 required to purchase the property from the record owners, and the deeds were executed. (R. 32.) The deeds left the name of the grantee blank, but the stipulation authorized the trustee's attorneys to insert the grantee's name. (R. 31, 32.) The committee was named as nominee by the trustee to take possession of the properties. From July 1, 1933, until November 20, 1933, Russell C. Perkins, as agent

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[2] The record shows, although these facts were not adverted to in the Board's findings, that on December 31, 1928, the Marlborough Investment Co. had transferred the properties to the F. S. Stimson Company by warranty deed. (R. 135–137.) The F. S. Stimson Company subsequently changed its name to Stimson-Moore Co. (R. 138), and on June 3, 1931, Stimson-Moore conveyed the properties, likewise by warranty deed, to Gardner J. Gwinn, Inc. (R. 139–141.) These conveyances were made subject to the existing mortgage debt.

On February 26, 1932, there was a further conveyance by Gwinn, Inc., to State Developers, Inc., the purchaser assuming the mortgage liability. (R. 142–143.) State Developers, Inc., quit-claimed an undivided one-half interest in the properties to Russell L. Cooley on May 13, 1932. (R. 144–145.)

for the committee, managed the property, collected the rents, and paid the expenses. (R. 32.)

On September 30, 1933, the sheriff's foreclosure sale was held, and the bondholders' committee was the successful bidder and purchaser for a bid price of $340,425. This price was paid by a surrender of the deposited bonds plus cash. Neither the fair market value of bonds deposited with the committee plus the cash used in partial payment nor the fair market value of the property was in excess of $340,425 at the date of the foreclosure sale or on July 1, 1933. (R. 33, 34.)

On or about November 10, 1933, the bondholders organized Marlborough House, Inc., a corporation, to take over and manage the property acquired at the foreclosure sale. (R. 32.) Following confirmation of the sheriff's sale, the sheriff's certificate of purchase covering the property was made out to the bondholders committee and was assigned by the committee to Marlborough House, Inc. After the redemption period had passed, the sheriff's deed was issued directly to the corporation as assignee of the bondholders committee. (R. 33.)

After Marlborough House, Inc., was organized and took possession of the property, it issued all of its stock to the depositing bondholders of Marlborough Investment Co. (R. 34.) Non-depositors were paid in cash their pro rata share of the purchase price after deduction of their share of the cost of the foreclosure; this resulted in a payment

of 73.58% of the face value of their bonds. (R. 33–34.)

On September 28, 1938, the attorneys for the mortgage trustee filled in the name of Russell C. Perkins, trustee for the bondholders committee, as grantee in each of the quit claim deeds from State Developers, Inc., and the Cooleys, and on the same date Perkins, as trustee, delivered the quit claim deeds covering the property to Marlborough House, Inc. (R. 32.)

The steps taken by the committee in instituting the foreclosure and until the final vesting of title in the Marlborough House, Inc., were pursuant to a plan of reorganization formulated by the committee for the benefit of the bondholders in pursuance to the powers granted it by the agreement. (R. 34.)

In determining the income tax liability of the committee for the period from July 1, 1933, to November 21, 1933,[3] and of the new corporation for the remainder of the calendar year 1933 and for the years 1934 and 1935, the Commissioner used as the basis for computing depreciation the cost of the assets to the committee, taking, as representing the cost, the price bid at the foreclosure sale. (R. 25.) The Board of Tax Ap-

[3] The Board of Tax Appeals sustained the Commissioner's determination that the committee was taxable as a corporation. (R. 39–40.) The statute defines the term "corporation" to include "associations." Revenue Act of 1932, Section 1111 (a) (2). The committee did not petition for review of this determination by the Circuit Court of Appeals.

peals rejected the Commissioner's position, and decided that the committee and the new corporation had acquired the assets in connection with a reorganization and therefore were entitled to use the basis that the assets had in the hands of the old corporation less the depreciation already taken by the corporation. (R. 38.) The Circuit Court of Appeals reversed.

ARGUMENT

A.

These cases, like the three companion proceedings before the Court,[1] involve the problem of the tax consequences of readjustments in which corporate bondholders become the stockholders of a new corporation which succeeds to the business of the old. The immediate issue here is whether the committee which bought in the assets and the new corporation to which the assets were transferred are entitled to use the basis of the original corporate mortgagor in computing depreciation.

The Government's primary position, which we have developed in full in our brief in the *Southwest Consolidated* case, is that transactions of this character do not qualify as a reorganization within

[1] *Commissioner* v. *Southwest Consol. Corp.*, 119 F. (2d) 561 (C. C. A. 5th), certiorari granted, October 13, 1941, No. 286, this Term; *Commissioner* v. *Alabama Asphaltic Limestone Co.*, 119 F. (2d) 819 (C. C. A. 5th), certiorari granted, October 13, 1941, No. 328, this Term; and *Commissioner* v. *Palm Springs Holding Corp.*, 119 F. (2d) 846 (C. C. A. 9th), certiorari granted, October 13, 1941, No. 503, this Term.

the statutory definition. Revenue Act of 1928, Section 112 (i) (1).[5] Accordingly, the committee's basis must be the cost of the assets to it under Section 113 (a), since the exception in Section 113 (a) (7), providing for the use of the old corporation's basis, is not available. The new corporation in turn is entitled to use the committee's basis by virtue of Section 112 (b) (5) and Section 113 (a) (8).[6]

Our position rests fundamentally upon the proposition that under *LeTulle* v. *Scofield*, 308 U. S. 415, there is lacking the continuity of proprietary interest necessary for a reorganization within the purview of the statute, where a transaction shifts the ownership of a corporation from its stockholders to its creditors. This being true, there is no reorganization even though the transaction might otherwise appear to fall within the literal language of the statute. *E. g.*, *LeTulle* v. *Scofield*, supra; *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462.[7]

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[5] Although the *Southwest Consolidated* case arises under the reorganization definition in Section 112 (g) (1) of the Revenue Act of 1934, which is somewhat different, the fundamental issue is the same. See Government's brief, *Palm Springs* case, No. 503.

[6] The taxpayers agree that under these sections the basis of the properties will be the same in the hands of the committee and the corporation. Petitioner's Brief, p. 19.

[7] The same reasons preclude any possibility of the application of Section 112 (b) (5) and the complementary basis provision of Section 113 (a) (8). Government's brief, *Southwest Consolidated* case, p. 15, fn. 9.

The practical and legal considerations which support our position have been considered in detail in our *Southwest Consolidated* brief to which the Court is respectfully referred. The court below adopted this view in deciding the instant cases. We submit that the result is correct, and that the decision below should be affirmed.

B.

Moreover, apart from our principal contentions set forth in our *Southwest Consolidated* brief, the record in this case discloses additional grounds which require affirmance of the judgment below.

1. In these cases the record shows that at the time of the acquisition of the properties by the committee, neither the old mortgagor corporation, Marlborough Investment Co., Inc., nor its stockholders any longer had any interest in the assets. Shortly after the bonds were issued, the old corporation in 1928 had conveyed the properties to third parties. In 1932, following certain mesne consequences, the properties were owned in undivided half interests by State Developers, Inc., a corporation, and Russell L. Cooley, an individual. As part of the plan of the committee to take over the assets, State Developers, Inc., and Cooley were paid $10,025 for a quit-claim deed to their interests. See fn. 2, *supra*.[8]

[8] These facts are shown by the record and have not been disputed. While they have not previously been stressed as

In light of these facts, there is no support for the Board of Tax Appeals' conclusion that the committee is entitled to use the basis of the assets in the hands of the Marlborough Investment Co., the original owner and mortgagor. That company had not owned the properties for approximately 5 years. Even if we assume the committee had acquired the assets in connection with a reorganization, or in a transaction described in Section 112 (b) (5), this could mean no more than that the basis would be the same as in the hands of State Developers, Inc. and Cooley. The correlative provisions of Section 113 (a) (7) and (8) authorize the carry-over of the basis of the assets in the hands of the "transferor", not their basis in the hands of one who occupied a remote position in the chain of ownership.*

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providing further grounds in support of the Government's position, there would seem to be no reason why they should not be taken into account. Cf. *Riley Co.* v. *Commissioner*, 311 U. S. 55; *Helvering* v. *Gowran*, 302 U. S. 238.

* The Board of Tax Appeals reasoned that there was a reorganization under Section "112 (a) (3)", and that the Committee was entitled to the basis of Marlborough Investment Co. under Section 113 (a) (6). The statute does not contain a section numbered "112 (a) (3)," and presumably the Board meant to refer to Section 112 (b) (3). The essential fallacy of approaching the problem in terms of the applicability of this Section is developed in the concurring opinion of Circuit Judge Mathews in the court below. Section 112 (b) (3) concerns the recognition of gain or loss upon the exchange of securities, "in pursuance of the plan of reorganization" (i. e., under Section 112 (i) (1)). The question

2. These facts also emphasize the absence of a continuity of proprietary interest in the new corporation. The interest of the Marlborough Investment Co. and of its stockholders, had been terminated when the corporation first sold the properties in 1928. The ownership interest of State Developers, Inc., and Cooley was terminated by an outright cash purchase, following institution of the foreclosure proceedings, and as part of a stipulation under a decree of foreclosure would be entered. It is evident that, in no sense of the term can the transaction be regarded as a reorganization of Marlborough Investment Co. or of any other corporation. Rather, the procedure by which the bondholders followed their security into the hands of third parties and then reduced it to possession and ownership, in part by paying cash and in part by foreclosure, has all the earmarks of a sale.

3. Furthermore, this transaction cannot be brought even within the application of the literal language of the reorganization definition of Section 112 (i) (1) or the non-recognition provisions of Section 112 (b) (5). While this is likewise true in the *Southwest Consolidated* case, the analysis of the problem here is somewhat different and, we submit, even clearer.

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of the basis of the assets involved, in the case of a reorganization under Section 112 (i) (1), is determined by Section ~~112~~ (a) (7).

Certainly, there could be no reorganization as between either the committee or the new corporation and the old Marlborough Investment Co., which no longer owned the properties. Clause A of the definition describes the acquisition of "the properties of another corporation"; Clause B refers to the transfer by one "corporation" of its assets to another, with the transferor or its stockholders continuing in control. Similarly Section 112 (b) (5) describes the transfer of properties to a corporation, in which the "transferor" retains control. These were not the "properties" of Marlborough Investment Co.; Marlborough Investment Co. was not the "transferor", and neither that company nor its stockholders thereafter controlled either the committee or the new corporation.[10]

It may be argued that there was a "reorganization" or a tax-free exchange as between State Developers, Inc., and Cooley on the one hand and the committee on the other. The obstacles to such a theory, however, are obvious:

(a) Since Cooley was an individual, the reorganization definition can have no application. As

[10] Question may also be raised whether in any event a committee which is taxable as a corporation by virtue of the definition contained in Section 1111 (a) is a corporation for purposes of the non-recognition and reorganization provisions of Section 112. As to the circumstances in which a committee is a "corporation" within this definition, cf. *e. g. White* v. *Hornblower*, 27 F. (2d) 777 (C. C. A. 1st); *Jackson* v. *United States*, 110 F. (2d) 574 (C. C. A. 9th).

we have stated, these provisions are limited in their coverage to inter-corporate transactions.

(b) Section 112 (b) (5), while it applies to transfers by individuals, further requires that the transferors retain control, as that term is defined in Section 112 (j), Appendix, *infra*. Here, as we have stated, State Developers, Inc., and Cooley were bought out for cash. Furthermore, the transfer to the committee was not made "solely in exchange for stock or securities in such corporation" as the section requires.[11]

4. Finally, these facts leave no room for an argument based on the theory that where a corporation is insolvent, the creditors in effect become its stockholders, so that when they take over the properties there is a continuity of proprietary interest and so that they may also be deemed the "corporation" or the "transferor" within the language of the statute. The fundamental objections to this theory are set forth in our *Southwest Consolidated* brief (pp. 25–28). Here, in any event, the theory cannot work. Upon default, the bondholders had the right to pursue their security in the hands of the existing

[11] In view of the operation of the properties by the committee for a period of some months, it is difficult to disregard the intermediate transfer to it and to analyze the transaction as a transfer of the assets directly to the new corporation. See *Southwest Consolidated* brief, pp. 19, 21–24. Nevertheless, even if that assumption is made, there would still be lacking the retention of control necessary to bring the transaction under Sections 112 (b) (5) and 113 (a) (8).

owners and to assert a claim for any deficiency against the original corporate mortgagor. Even if this right to a deficiency claim could be said to give the bondholders a proprietary interest in the old corporation, it does not follow that they had such an interest in the assets in the hands of their then owners or that the bondholders could be regarded in any sense as the equivalent of the owners of the properties. Rather the payment of $10,025 in cash to State Developers, Inc., and the Cooleys for a transfer of their interests, as part of the bondholders' plan to take over the assets, entirely negatives any such assumption. It establishes the fact that prior to the execution of the deed and the foreclosure sale the record owners, and not the bondholders, had the proprietary interest in the properties.

C.

The taxpayers have argued that if the committee's acquisition of the properties is treated as a purchase, and not as a reorganization, the cost to the committee should be measured by the amount of cash advanced by the committee plus the *face value* of the deposited bonds. No authority has been advanced for the support of this contention, and we submit that it is unsound.

As we have shown in our brief in the *Southwest Consolidated* case (p. 13, fn. 5), the cost of assets bid in by a mortgage creditor upon foreclosure

is properly measured by the market value of those assets. Regulations 77, Article 193. Obviously this cost is neither increased nor decreased by the face value of the obligations.

The taxpayers' argument assumes that the cost of the bonds to all of the individual bondholders was their full face amount. The record contains no evidence to support such a conclusion. But even if we disregard this difficulty for the sake of argument, it is fallacious to assume that the cost of the *bonds* is the cost of *assets* later received in exchange for them *in a taxable transaction.*

There are situations in which the original cost of bonds to their owners will constitute the *basis* of property received in exchange for them. Those are cases which come within the express exception to the rule of cost provided in Section 113 (a) (6) where property is exchanged in certain tax-free transactions. The taxpayers' argument, in substance, would treat as the *cost* basis in a taxable transaction the basis that the statute provides in these situations as an *exception to cost.*

D.

In the *Southwest Consolidated* case, and similarly in the *Alabama Asphaltic* case, we suggested further proceedings, if the Government's position that the basis of the old corporation should not carry over is sustained, to the extent necessary

to redetermine the deficiency using as the basis the market value of the properties rather than the bid price. This should not be necessary in the instant case. Although the Commissioner used the bid price in ascertaining the basis, it has been found that the market value of the assets did not exceed that amount.

Respectfully submitted,

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JANUARY 1942.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(5) *Transfer to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each

is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(i) *Definition of Reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation); or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place or organization, however effected.

* * * * *

(j) *Definition of Control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(6) *Tax-free exchanges generally.*—If the property was acquired upon an exchange described in section 112 (b) to (e), inclu-

sive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112 (b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

(7) *Transfers to corporation where control of property remains in same persons.*— If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall

not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) *Property acquired by issuance of stock or as paid-in surplus.*—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), * * * then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * * *

(b) *Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property.

The relevant provisions of Regulations 86 under the Revenue Act of 1934 are set forth in the Appendix to our brief in the *Southwest Consolidated* case. Regulations 77 under the Revenue Act of 1932 do not contain provisions material to the issue.

Regulations 77, Article 193, corresponds to Regulations 86, Article 23 (k)–3, referred to in fn. 5, p. 13, of the *Southwest Consolidated* brief.

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SUPREME COURT OF THE UNITED STATES.

Nos. 128 & 129.—October Term, 1941.

Bondholders Committee, Marlborough Investment Company, First Mortgage Bonds, Petitioner, 128 *vs.* Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Marlborough House, Inc., Petitioner, 129 *vs.* Commissioner of Internal Revenue.	

[February 2, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

The primary question involved in these cases is whether the transaction in question qualified as a "reorganization" under that portion of § 112(i)(1) of the Revenue Act of 1932 (47 Stat. 169, 196) which provides: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of . . . substantially all the properties of another corporation). . . ."

In 1927 the Marlborough Investment Co. issued its bonds in the principal amount of $500,000. They were secured by its apartment building in Seattle and the personal property therein. There was a default in May, 1932. A bondholders' committee was formed and there were deposited with it more than 97% of the total of over $450,000 face amount of the bonds then outstanding. In view of *Helvering* v. *Alabama Asphaltic Limestone Co.*, No. 328, decided this day, the precise mechanics whereby the reorganization was consummated are not material. Suffice it to say that pursuant to a plan of reorganization formulated by the committee under the broad powers accorded it in the deposit agreement, there was a foreclosure and sale; the committee was the successful bidder at the price of $340,425 which was paid by the surrender of deposited bonds plus cash; Marlborough House, Inc. was formed by the bondholders; it acquired the property from the committee and issued all of its stock to the depositing bondholders; and non-assenting bondholders were paid in cash their *pro rata* share of the purchase price.

In determining the income tax liability of the committee[1] for a par of 1933 and of the new corporation for a part of 1933 and for 193 and 1935 the Commissioner used as the basis for computing depre ciation the price bid at the foreclosure sale. The Board of Tax Ap peals found that neither the fair market value of the deposite bonds plus the cash expended in partial payment nor the fair mar ket value of the property was in excess of $340,425 at the date of th foreclosure sale or when the committee took possession. The Boar held that since the new corporation had acquired the property in connection with a "reorganization", it was entitled to use th basis in the hands of the old corporation, less depreciation. 4 B. T. A. 882. The Circuit Court of Appeals reversed. 11 F. 2d 511.

For the reasons stated in *Helvering* v. *Alabama Asphaltic Lime stone Co., supra*, this transaction clearly would have been a "reor ganization" within the meaning of § 112(i)(1) but for one fact That fact is that the property was not acquired by the committe or the new corporation from Marlborough Investment Co.[2] I December, 1928, several years prior to the insolvency reorganization Marlborough Investment Co., the issuer of the bonds, had trans ferred the property to another corporation. As a result of mesn conveyances the property was held in May, 1932 by State Developers Inc. and one Cooley. While the foreclosure proceedings were pend ing that corporation and Cooley executed and delivered a quit clai deed to the property in consideration of the payment of the cas sum of $10,025 which was furnished by the committee.

In view of these circumstances there was no "reorganization" within the meaning of § 112(i)(1). The parenthetical part clause A which is relevant here covers "the acquisition by one cor poration" of substantially all of the properties "of another cor poration". Clause B covers certain transfers "by a corporation" all or a part of its assets "to another corporation" where the trans feror or its stockholders continue in control. These were not "pro erties" of Marlborough Investment Co. It had long since ceased t own them. It was not the "transferor". Furthermore, § 113(a) (7

[1] The committee took possession of the property and managed it for a pa of the year 1933 prior to the date when the new corporation acquired it. Th Board held that the committee was taxable as a corporation on the income re ceived during that period by it. The committee did not petition for revie of that determination by the Circuit Court of Appeals.

[2] Though respondent apparently did not urge this point before the Boar or the court below, it may of course support the judgment here by any matte appearing in the record. Le Tulle v. Scofield, 308 U. S. 415, 421, and cas cited.

authorizes a carry-over of the basis of the properties[3] in the hands of the "transferor", not their basis in the hands of one who may have occupied an earlier position in the chain of ownership. Hence it is immaterial that under the rule of *Helvering* v. *Alabama Asphaltic Limestone Co.*, *supra*, the bondholders had succeeded to all of the proprietary interest in Marlborough Investment Co. The property whose basis is in controversy here was not acquired from it. Nor was there a "reorganization" as between the committee or the new corporation on the one hand and State Developers, Inc. and Cooley on the other. Cooley was an individual. The "reorganization" provisions in question cover only inter-corporate transactions. Sec. 113(a)(8) provides for a carry-over of the basis of the properties in the hands of the "transferor" if the property was acquired by a corporation after December 31, 1920, by the issuance of its stock or securities "in connection with a transaction" described in § 112(b)(5). Sec. 112(b)(5) includes transfers by individuals;[4] but it requires that the transferor remain in control. Cooley and State Developers, Inc. were bought out for cash.

It is argued that if the committee's acquisition of the properties is to be treated as a purchase rather than a "reorganization", the cost to the committee should be measured by the amount of the cash advanced by the committee plus the face value of the deposited bonds. There is no foundation for that contention. The cost of assets bid in by a mortgage creditor on foreclosure is to be determined by the fair market value of the property. See Art. 193, Treasury Regulations 77; *Helvering* v. *New President Corp.*, 122 F. 2d 92, 96-97. Although the Commissioner used the bid price in ascertaining the basis, the Board found that the market value of the assets did not exceed that amount. Respondent therefore suggests that a remand to the Board to ascertain the fair market value is not necessary. Accordingly the judgment below is

Affirmed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

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[3] By § 114(a) the basis upon which depreciation is allowed is the adjusted basis provided in § 113(b) for the purpose of determining gain or loss. By § 113(b) such adjusted basis is the basis determined under § 113(a). By § 113(a) the basis of property shall be "cost", with enumerated exceptions. One of those exceptions is contained in § 113(a)(7) set forth in Palm Springs Holding Corp. v. Commissioner, No. 503, decided this day, *ante* p. —, note 1.

[4] Sec. 112(b)(5) provides in part: "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation".